

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF HEALTH

In the Matter of LaRae Lundeen Fjellman,  
Unlicensed Complementary and Alternative  
Health Care Practitioner

**RULING ON DEPARTMENT'S MOTION  
FOR SUMMARY DISPOSITION**

The above matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice and Order for Hearing issued on March 8, 2006, by the Director of the Division of Compliance Monitoring for the Minnesota Department of Health, and the Department's Motion for Summary Disposition. Audrey Kaiser Manka, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130, appeared on behalf of the Health Occupations Program of the Minnesota Department of Health ("the Department"). Susan M. Gallagher, Attorney at Law, Gallagher Law Office, 10 South Fifth Street, Suite 700, Minneapolis, MN 55402, appeared on behalf of the Respondent, LaRae Lundeen Fjellman.

Based upon the filings and arguments of the parties and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

**RECOMMENDATION AND ORDER**

IT IS HEREBY RECOMMENDED that:

The Department's Motion for Summary Disposition be granted as to its allegations that the Respondent violated Minn. Stat. § 146A.08, subd. 1(d) and (r).

IT IS HEREBY ORDERED that:

The Department's Motion for Summary Disposition is denied as to its allegation that the Respondent violated Minn. Stat. § 146A.08, subd. 1(q). A conference call shall be held by telephone on **Thursday, September 14, 2006, at 1:30 p.m.** to schedule a hearing date with respect to this allegation. The Administrative Law Judge will initiate the call.

Dated: September 11, 2006

Barbara L. Neilson  
BARBARA L. NEILSON  
Administrative Law Judge

## MEMORANDUM

The Respondent is the owner of a massage therapy business in Lindstrom, Minnesota, and Balsam Lake, Wisconsin. She has practiced as a massage therapist in Minnesota since 1990. Massage therapists are not required to be licensed in the State of Minnesota. However, Chapter 146A of the Minnesota Statutes prohibits specific conduct by “complementary and alternative health care” practitioners and authorizes the Commissioner of Health to take action against practitioners who engage in prohibited acts. The statute defines “complementary and alternative health care practices” to include the “broad domain of complementary and alternative healing methods and treatments, including but not limited to: . . . acupressure; . . . cranial sacral therapy; . . . [and] body work, massage, and massage therapy . . . .”<sup>1</sup> Disciplinary action that the Department is permitted to take includes revocation or suspension of a practitioner’s right to practice; the placement of conditions on a practitioner’s practice; the imposition of a civil penalty; payment of costs associated with the disciplinary proceeding; and censure or reprimand of a practitioner.<sup>2</sup>

The Department of Health has initiated this contested case proceeding to determine whether or not disciplinary action should be imposed upon the Respondent in accordance with Minn. Stat. § 146A.09. As a basis for disciplinary action, the Department alleges that the Respondent did not provide clients with the Client Bill of Rights required by Minn. Stat. § 146A.11, in violation of Minn. Stat. § 146A.08, subd. 1(r). In addition, the Department alleges that the Respondent violated Minn. Stat. § 146A.08, subd. 1(q) (which prohibits practitioners from undertaking or continuing a professional relationship with a client in which the objectivity of the practitioner would be impaired) by socializing frequently with a massage client, accepting a gift from him, and giving him flowers during the time she was providing therapy to him. The Department further asserts that the Respondent violated Minn. Stat. § 146A.08, subd. 1(d) (which prohibits practitioners from engaging in sexual contact with a former client) by moving in with the same client, beginning a dating and sexual relationship, and marrying him within two years of providing him with massage services. The Department seeks entry of summary disposition in this case on the grounds that the pertinent facts are not disputed by the Respondent and clearly amount to violations of Chapter 146A of the Minnesota Statutes. The Respondent has opposed the Department’s motion based on allegations that issues of fact remain for hearing as to whether a violation of Minn. Stat. § 146A.08, subd. 1(q) occurred and arguments that Minn. Stat. § 146A.08, subd. 1(d) and (r) are unconstitutional.

### Motion Standard

The Department has filed a motion for summary disposition. Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is

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<sup>1</sup> Minn. Stat. § 146A.01, subd. 4. (Unless otherwise specified, references to Minnesota Statutes are to the 2004 edition.)

<sup>2</sup> Minn. Stat. § 146A.09, subd. 1.

entitled to judgment as a matter of law.<sup>3</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.<sup>4</sup> A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.<sup>5</sup>

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.<sup>6</sup> The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts.<sup>7</sup> The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.<sup>8</sup> The judge's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist.<sup>9</sup>

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party.<sup>10</sup> All doubts and factual inferences must be resolved against the moving party.<sup>11</sup> If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.<sup>12</sup> But "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'"<sup>13</sup>

## Underlying Facts

Based upon the submissions of the parties, and viewing the facts in a light most favorable to the Respondent as the non-moving party, the following facts are assumed to be true for purposes of this motion. The Respondent offers massage therapy, acupuncture, and cranial sacral therapy at a business she operates in Lindstrom,

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<sup>3</sup> *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

<sup>4</sup> See, Minn. Rules 1400.6600 (2006).

<sup>5</sup> *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

<sup>6</sup> *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

<sup>7</sup> *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997), citing, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

<sup>8</sup> *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

<sup>9</sup> *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997) (citations omitted).

<sup>10</sup> *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

<sup>11</sup> See, e.g., *Celotex*, 477 U.S. at 325; *Thompson v. Campbell*, 845 F.Supp. 665, 672 (D. Minn. 1994); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).

<sup>12</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

<sup>13</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Minnesota called “The Balanced Body.”<sup>14</sup> These therapies are considered under Minnesota law to be complementary and alternative healing methods.<sup>15</sup> Because the population of Lindstrom, Minnesota is small (only 3,015 in the year 2000), the Respondent knows many of the members of the community.<sup>16</sup> It is not uncommon for her to provide massage therapy to her friends or seek treatment from her friends in other professions.<sup>17</sup>

The Respondent has had a notice posted in the entry to her business since 1998. The notice states:

NOTICE TO ALL CLIENTS  
OF  
THE BALANCED BODY

IF YOU HAVE ANY CONCERNS ABOUT YOUR SERVICE, PLEASE DISUCSS [sic] THE MATTER WITH ME PERSONALLY. IF YOU ARE NOT SATISFIED WITH THE RESULTS OF THE DISCUSSION, PLEASE PUT YOUR CONCERNS IN WRITING. IF YOU ARE STILL NOT SATISFIED WITH THE OUTCOME YOU MAY FILE A COMPLAINT AND MAIL TO:

ABMP  
1271 SUGARBUSH DRIVE  
EVERGREEN, CO 80439

MY ID NUMBER IS:

131573<sup>18</sup>

The Respondent was not aware of the statutory requirement that complementary and alternative health care practitioners must provide their clients with a Bill of Rights containing particular items of information until the Department notified her of the requirement during approximately May of 2004.<sup>19</sup>

The Respondent first met Client One at a gathering at the home of a mutual friend in 1998.<sup>20</sup> They conversed and discovered that they shared an interest in gardening.<sup>21</sup> Because the Respondent’s niece and Client One’s daughter played volleyball together,

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<sup>14</sup> Unofficial Transcript of Department of Health’s May 14, 2004, Interview with Respondent (attached to Affidavit of Richard Hnasko as Ex. A) (hereinafter referred to as “Interview Transcript”) at 3, 14, 32; Affidavit of Respondent LaRae Fjellman, ¶ 2.

<sup>15</sup> See Minn. Stat. § 146A.01, subd. 4(a)(1), (5), and (17).

<sup>16</sup> Respondent Aff., ¶ 3.

<sup>17</sup> *Id.*

<sup>18</sup> Respondent Aff., ¶ 5 and Ex. B. The “ABMP” apparently refers to Associated Bodywork & Massage Professionals. See Mr. Schoener’s Dec. 15, 2004, report at p. 2 (attached to Respondent’s Affidavit as Ex. B).

<sup>19</sup> Interview Transcript at 11-12.

<sup>20</sup> Interview Transcript at 12-13; Client One Aff., ¶ 3.

<sup>21</sup> Client One Aff., ¶ 3.

they frequently saw each other at volleyball games.<sup>22</sup> They also occasionally saw each other at other community events.<sup>23</sup> On one occasion, they had lunch together to talk about gardening.<sup>24</sup>

In late September or early October of 2000, Client One's physician advised him to seek massage therapy for his thoracic outlet syndrome.<sup>25</sup> The Respondent asked around about who was a good massage therapist and thereafter contacted the Respondent for a massage therapy appointment.<sup>26</sup> The Respondent provided massage therapy to Client One on approximately 24 occasions between October 9, 2000, and May 24, 2002 (seven appointments during 2000, nine in 2001, and eight in 2002).<sup>27</sup> This therapy was sought by Client One for treatment of his thoracic outlet syndrome and not for any condition related to his mental or emotional health.<sup>28</sup> Client One's last massage therapy appointment with the Respondent was on or about May 24, 2002.<sup>29</sup> The Respondent also provided massage therapy to Client Three (Client One's wife) on two occasions in 2000 and to Client Two (Client One's daughter) on several occasions during 2000 and 2002.<sup>30</sup> Client Three asserts by affidavit that the Respondent did not provide her or her daughter with a copy of a Client Bill of Rights.<sup>31</sup>

The Respondent and Client One both attended some classes during the time she provided massage therapy to him, but they did not make advance arrangements to do so or drive together to class.<sup>32</sup> The Respondent gave Client One flowers in January of 2001 or 2002 on the anniversary of his sobriety.<sup>33</sup> In January of 2002, after realizing that he should have been tipping the Respondent for massage therapy, Client One purchased a \$100 gift certificate for the Respondent to the White Flower Farm that included a free subscription to a gardening magazine.<sup>34</sup> Client One told the Respondent that the gift certificate was to make up for Client One's failure to provide tips for approximately 30 massage therapy sessions received by Clients One, Two, and Three during the past two years.<sup>35</sup>

Client One separated from his wife (Client Three) in May of 2002, and rented a two-bedroom apartment. Their divorce was final in March of 2003.<sup>36</sup> When Client One heard that the Respondent was looking for an apartment, he offered her the second bedroom of his apartment and she agreed to pay half the rent and share expenses.<sup>37</sup>

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<sup>22</sup> Interview Transcript at 17, 18-19.

<sup>23</sup> *Id.*

<sup>24</sup> Client One Aff., ¶ 3.

<sup>25</sup> Client One Aff., ¶ 5; Interview Transcript at 13-14.

<sup>26</sup> Client One Aff., ¶ 5.

<sup>27</sup> Client One Aff., ¶ 5; Hnasko Aff., ¶ 5.

<sup>28</sup> Client One Aff., ¶¶ 5, 8.

<sup>29</sup> Client One Aff., ¶ 5; Interview Transcript at 15.

<sup>30</sup> Client Three Aff., ¶ 3; Client One Aff., ¶ 5.

<sup>31</sup> Client Three Aff., ¶ 4.

<sup>32</sup> Interview Transcript at 18, 29-31; Client One Aff., ¶ 3.

<sup>33</sup> Interview Transcript at 36-37.

<sup>34</sup> Client One Aff., ¶ 7; Client Three Aff., ¶ 8 and Ex. A; Interview Transcript at 37-38.

<sup>35</sup> Client One Aff., ¶ 7.

<sup>36</sup> Client One Aff., ¶¶ 4, 6.

<sup>37</sup> Client One Aff., ¶ 6; Interview Transcript at 38-41.

The Respondent moved into the apartment in June of 2002.<sup>38</sup> They were simply roommates at that time, and their relationship was not romantic.<sup>39</sup>

The Respondent and Client One began dating each other in July 2002.<sup>40</sup> At that time, they discussed the fact that the Respondent would no longer serve as a massage therapist for Client One if he needed future services.<sup>41</sup> The Respondent and Client One went on a one-week vacation to Florida together in August 2002 and shared a condominium during that trip,<sup>42</sup> and also traveled together on other occasions after they began dating.<sup>43</sup> The Respondent and Client One engaged in sexual intercourse for the first time in October 2002.<sup>44</sup> The Respondent and Client One became engaged in March 2003, participated in a commitment ceremony in April 2003, and were married in September 2003.<sup>45</sup>

After a complaint was filed, investigators employed by the Department conducted an interview of the Respondent (who was accompanied by her then-attorney) on May 14, 2004.<sup>46</sup> An unofficial typewritten transcript of the interview was prepared by the Department.<sup>47</sup> By affidavit filed in connection with the Respondent's response to the motion for summary disposition, current counsel for the Respondent asserts that the unofficial transcript is not a true and correct copy of the recorded interview because there are several discrepancies between the tape and the transcript. Counsel did not provide a detailed list of the alleged discrepancies.<sup>48</sup> The Administrative Law Judge has compared the tape recording of the interview with the unofficial transcript and has determined that, although the typewritten transcript contains numerous discrepancies and typographical errors and does not report each and every word spoken during the interview, these discrepancies and errors appear to be insignificant, with one possible exception: on page 37 (line 15), the typewritten transcript states that the Respondent received "plants" from Client One, but the Respondent appears to state on the tape recording that she received "a plant" from him.

The Department asked the Respondent to participate in psychological testing and evaluation by Gary Schoener, Licensed Psychologist. The Respondent agreed to submit to the testing and evaluation and also paid for it.<sup>49</sup> Mr. Schoener issued a written report<sup>50</sup> that summarized his findings and conclusions, based on an interview with the Respondent and the administration of two psychological tests (the Minnesota Multiphasic Personality Inventory – 2 and the Millon Clinical Multiaxial Inventory – III). In his report, Mr. Schoener noted that Minnesota's two-year prohibition against post-therapy sex with a

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<sup>38</sup> Interview Transcript at 38-41; Client One Aff., ¶ 6.

<sup>39</sup> Interview Transcript at 38; Client One Aff., ¶ 6.

<sup>40</sup> Interview Transcript at 17, 43; Client One Aff., ¶ 6.

<sup>41</sup> Client One Aff., ¶ 6.

<sup>42</sup> Interview Transcript at 21-22; Client Three Aff., ¶ 6.

<sup>43</sup> Interview Transcript at 22-23, 32; Client One Aff., ¶ 6.

<sup>44</sup> Interview Transcript at 43-44; Client One Aff., ¶ 6.

<sup>45</sup> Interview Transcript at 31-32, Client One Aff., ¶ 6 and Ex. A; Client Three Aff., ¶ 10 and Ex. B.

<sup>46</sup> Hnasko Aff., ¶ 2.

<sup>47</sup> Hnasko Aff., ¶ 3.

<sup>48</sup> Affidavit of Susan M. Gallagher, ¶ 2.

<sup>49</sup> Respondent Aff., ¶ 4.

<sup>50</sup> The report is attached to Respondent's Affidavit as Ex. A.

former client is not part of the existing ethics codes for massage therapists.<sup>51</sup> His report concluded with the following opinion:

Based on my assessment I see no reason to believe that [the Respondent] is not competent and able to practice massage therapy safely. I did not find any emotional or mental disorder which would put clients at risk. The sort of overlapping relationships that she cites are common in rural and small town practice and in and off [sic] themselves do not represent violations.

I believe that is more likely than not that the rules that she violated—handing out the Client's Bill of Rights and abstaining from a sexual involvement with a former client for two years post-termination—were ones not known to her. I also believe that these are not intuitive rules which a reasonable and prudent practitioner would know or presume absence of knowledge of a statute or rule.<sup>52</sup>

## Discussion

In its motion, the Department alleges that the Respondent violated Minn. Stat. § 146A.08, subd. 1(d), (q), and (r). Those provisions state that the Commissioner of Health may impose disciplinary action against any unlicensed complementary and alternative health care practitioner who engages in the following prohibited conduct:

(d) Engaging in sexual contact with a complementary and alternative health care client or former client, engaging in contact that may be reasonably interpreted by a client as sexual, engaging in any verbal behavior that is seductive or sexually demeaning to the patient, or engaging in sexual exploitation of a client or former client. For purposes of this paragraph, "former client" means a person who has obtained services from the unlicensed complementary and alternative health care practitioner within the past two years.

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(q) Undertaking or continuing a professional relationship with a complementary and alternative health care client in which the objectivity of the unlicensed complementary and alternative health care practitioner would be impaired.

(r) Failure to provide a complementary and alternative health care client with a copy of the client bill of rights or violation of any provision of the client bill of rights.

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<sup>51</sup> Respondent's Aff., Ex. A at 4. The code of ethics to which Mr. Schoener refers apparently is that of the Associated Bodywork & Massage Professionals. Ex. A at 2, 4.

<sup>52</sup> Respondent's Aff., Ex. A at 7-8.

Each of these prohibitions will be discussed below, along with the arguments made by the parties.

### **Sexual Contact with a Former Client**

The Department emphasizes that there is no dispute that the Respondent provided massage therapy to Client One beginning in October or November of 2000 until May of 2002. The Department also points out that the Respondent admits that she moved in with the Respondent in June of 2002, began dating Client One during the summer of 2002, began a sexual relationship with him in October of 2002, and married him in September of 2003. Accordingly, the Department argues that there is no question that the Respondent engaged in sexual contact with Client One during the two-year period of time that he was a “former client” under the statute.

The Respondent does not dispute that she engaged in a sexual relationship with Client One within two years of their last massage therapy appointment, but makes a number of arguments that the statutory provision is unconstitutional on its face and as applied to her. Specifically, the Respondent contends that the conduct proscribed by Minn. Stat. § 146A.08, subd. 1(d) is an unconstitutional infringement on the right to privacy accorded under the Minnesota and U.S. Constitutions. The Respondent argues that the prohibition against sexual contact with former clients contained in Minn. Stat. § 146A.08, subd. 1(d), is unconstitutional as applied to the Respondent because she is now married to her former client and the State has a compelling interest in promoting marriage. The Respondent also makes certain due process and equal protection arguments based upon assertions that she did not receive notice of the statutory requirements, similar requirements are not imposed on other health care providers, and massage therapists should not be subject to these requirements because they do not treat mental, emotional or behavioral disorders. The Department argues in response that both the Administrative Law Judge and the Commissioner of Health lack jurisdiction to decide such constitutional issues or, in the alternative, that the provisions do not violate constitutional protections.

Although an Administrative Law Judge may decide a constitutional question involving the interpretation of a statute or its application to certain facts, the Administrative Law Judge lacks authority to declare a statute unconstitutional on its face in a contested case proceeding such as this. That power is vested in the judicial branch.<sup>53</sup> The Respondent’s arguments amount to broad challenges to the constitutionality of the statutory provision on its face, and not simply challenges to its application to this particular Respondent. Therefore, the Administrative Law Judge lacks subject matter jurisdiction to consider these arguments in the context of the present contested case proceeding. This ruling is consistent with a prior decision in a contested

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<sup>53</sup> G. Beck, M.B. Gossman, L. Nehl-Trueman, *Minnesota Administrative Procedure* § 11.5 (2d Ed. 1998). See, e.g., *Neeland v. Clearwater Memorial Hospital*, 237 N.W.2d 366, 368 (Minn. 1977); *Petterssen v. Commissioner of Employment Services*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (1975); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In the Matter of Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. Ct. App. 1993). *Accord Jackson County Education Association v. Grass Lake Community*, 95 Mich. App. 635, 641, 291 N.W.2d 53, 56 (1980).



case proceeding involving a psychologist subjected to a similar rule.<sup>54</sup> Of course, the Respondent is entitled to make and preserve her constitutional arguments for appeal from the agency decision, and has done so.

Client One clearly falls within the definition of a “former client” under the statute because he had received massage therapy services from the Respondent within the two years preceding their sexual relationship. Accordingly, it is evident that the Respondent has violated Minn. Stat. § 146A.08, subd. 1(d), and the Department is entitled to summary disposition with respect to that violation.

### **Impaired Objectivity**

The Department contends that the Respondent had a personal relationship with the Respondent prior to the time she provided massage therapy to him, and that they had a dual relationship involving both personal and professional activities, resulting in impaired objectivity. In support of this argument, the Department asserts that the Respondent considered Client One to be her “gardener buddy” and, during the time he was a client, gave him bouquets of flowers on the anniversaries of his sobriety, accepted a \$100 gift certificate from him, and took classes with him. The Department argues that the fact that the Respondent decided to share an apartment with Client One shortly after her last massage appointment with him, took a trip with him to Florida in August 2002, and began engaging in sexual intercourse within five months of his last appointment is further evidence of impaired objectivity. The Department also contends that it is unwise for massage therapists to accept tips, citing a text mentioned by Mr. Schoener in his report.<sup>55</sup>

In response, the Respondent asserts that the Department has not offered sufficient evidence that the Respondent undertook or continued a professional relationship with Client One in which her objectivity was impaired to be entitled to entry of judgment on this allegation. The Respondent contends that there is no evidence that the Respondent and Client One planned to attend classes together, and provided an affidavit by Client One attesting that they did not make advance arrangements to enroll together. In addition, the Respondent argues that their prior acquaintance, Respondent’s acceptance of the gift certificate, and their exchange of small and inconsequential gifts did not impair the Respondent’s objectivity or have any adverse effect. The Respondent also contends that there is no prohibition against the acceptance of tips by massage therapists and disputes whether the text relied upon by the Department is authoritative. Finally, the Respondent asserts that this portion of the statute is unconstitutionally vague and therefore void.

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<sup>54</sup> *In the Matter of the Psychology License of Carlson*, OAH Docket No. 11-0907-11703-2 (Findings of Fact, Conclusions of Law, and Recommendation issued Sept. 17, 1999) (ALJ lacks subject matter jurisdiction to consider arguments raised by a psychologist that the application of a rule prohibiting sexual intercourse for two years from the date of the last professional contact violated his First Amendment right of freedom of expression and fundamental rights to make decisions regarding childbearing; psychologist continued to live with the former client in a romantic relationship).

<sup>55</sup> B. Benjamin & C. Sohnen-Moe, *The Ethics of Touch* (SMA, Inc., 2005), at 187-88.

For the reasons discussed above, the Administrative Law Judge lacks subject matter jurisdiction to address the Respondent's assertion that this portion of the statute is unconstitutionally vague. This argument is preserved for appeal.

On this record, the Administrative Law Judge concludes that there is insufficient evidence of impaired objectivity to order summary disposition for the Department. It is evident that there are genuine issues of material fact concerning whether the Respondent in fact undertook or continued a professional relationship with Client One in which her objectivity would be impaired. The statutory language of necessity requires examination of the nature of the Respondent's relationship with Client One *during the time he was, in fact, her client*; it would not be proper to jump to conclusions about impairment based upon the *subsequent* relationship that developed between the Respondent and Client One. Genuine issues of material fact remain for hearing regarding the nature of the personal relationship between the Respondent and Client One prior to May 2003, the extent to which they planned to spend time together or simply interacted by chance in the small community in which they lived, the nature and purpose of any gifts they may have exchanged, and whether the Respondent's objectivity was, in fact, impaired as a result. The propriety of accepting the gift certificate as a gratuity also requires additional factual and legal development.<sup>56</sup> Accordingly, this issue should proceed to hearing.

### **Client Bill of Rights**

Minn. Stat. § 146A.11, subd. 1, requires that all unlicensed complementary and alternative health care practitioners must provide each client with a written copy of the Complementary and Alternative Health Care Client Bill of Rights prior to providing the client with treatment as well as post a copy in a prominent location in their office. The statute goes on to specify numerous items that must be included in the Bill of Rights, including the fact that Minnesota has not adopted any educational and training standards for such practitioners; such practitioners may not provide medical diagnoses; clients may expect to be free from verbal, physical, or sexual abuse by such practitioners; and procedures for clients to follow to file a complaint with the Office of Unlicensed Complementary and Alternative Health Care Practice. Minn. Stat. § 146A.08, subd. 1(r), states that failure to provide clients with the Bill of Rights is grounds for disciplinary action.

The Department asserts that it is entitled to summary disposition that the Respondent has violated this provision based upon the affidavit of Client Three (Client

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<sup>56</sup> Even assuming, *arguendo*, that *The Ethics of Touch* is an authoritative text in this area, the portion of the text relating to tips does not support the Department's view that it is never acceptable for massage therapists to receive tips. The section of the text addressing tips starts out by acknowledging that "[t]he topic of accepting gratuities is complex" and mentioning that "some professions would never consider [accepting gratuities] because of the problems inherent with transference." The text proceeds to recognize that "practitioners who work in settings such as spas usually receive minimal remuneration and rely on their tips" and discusses the pros and cons of accepting tips. The text notes that the manner in which envelopes are provided for gratuities at spas "makes all the difference" and states that "[i]t is one thing to tastefully display the envelopes at the front counter; it is another to post a sign by the envelopes that says 'I've helped make your day, now help make mine (hint, hint).'" The text simply mentions the option of electing not to accept tips and does not pronounce it unethical to take a contrary approach. See pages 187-88.

One's former wife) that neither she nor her daughter (Client Two) received a Client Bill of Rights from the Respondent<sup>57</sup> and the Respondent's own admission that she was unaware of this statutory requirement and did not provide the Bill of Rights to clients before the Department brought the matter to her attention in 2004.<sup>58</sup> The Respondent points out that complementary and alternative practitioners were not required to comply with the Bill of Rights statute until July 1, 2001, so the requirement was not in effect during 2000 when Client Three received massage therapy.<sup>59</sup> The Respondent also contends that the notice posted by the Respondent complied with the spirit of the statutory requirement to provide the Client Bill of Rights, but admits that there was a technical violation of the statute by the Respondent and that additional information and dissemination was needed. The Respondent points out that, once the Respondent became aware of the technical violation, she took immediate steps to modify her practice to comply with the requirement.

The Respondent has admitted that she did not provide clients with a copy of the Bill of Rights as required by the statute until after she was advised by Department staff in May of 2004 of the statutory requirement to do so. The minimal notice she posted in her office did not include all of the information required by the statute to be included in the Bill of Rights matters and, in any event, the Respondent did not give a copy of her posted notice to clients. Based upon the Respondent's own admissions, the Administrative Law Judge concludes that a violation has occurred and the Department is entitled to summary disposition on this issue.

### **Conclusion**

The Administrative Law Judge lacks authority to declare Minn. Stat. § 146A.08, subd. 1(d) or (q) unconstitutional or otherwise address the constitutional arguments raised by the Respondent. There are no material facts in dispute in this case with respect to the alleged violations of Minn. Stat. § 146A.08, subd. 1(d) and (r), and it is recommended that summary disposition be granted to the Department regarding those violations. Under Minn. Stat. §§ 146A.08 and 146A.09, the Department is authorized to take disciplinary action against the Respondent for violations of those provisions.

There are material facts in dispute with respect to the alleged violation of Minn. Stat. § 146A.08, subd. 1(q), relating to impaired objectivity. The Department is not entitled to summary disposition with respect to that alleged violation, and that issue should proceed to hearing. A conference call will be held on September 14, 2006, at 1:30 p.m. to discuss the scheduling of a hearing date.

**B. L. N.**

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<sup>57</sup> Affidavit of Client Three, ¶ 4.

<sup>58</sup> Interview Transcript at 11-12.

<sup>59</sup> Although Client Three also asserts that Client Two (her daughter) did not receive a copy of the Client Bill of Rights during her 2002 sessions with the Respondent, Client Two did not provide an affidavit in this matter, and there is no showing that Client Three accompanied Client Two to her massage appointments or would otherwise have personal knowledge of this situation.